

***Massachusetts Highway Department v. American  
Federation of State, County and Municipal Employees,  
Council 93\****

In a recent decision, the Massachusetts Supreme Court refused to vacate an arbitrator's award which reinstated a discharged employee under a state employment collective bargaining agreement. This decision addresses the issue of when a court should vacate an arbitrator's decision under a collective bargaining agreement on the ground that the decision offends public policy. Although some courts have vacated an arbitrator's award because a reinstated employee's misconduct violated a well-defined public policy, the Massachusetts Supreme Court affirmed the arbitrator's award because the award itself did not violate public policy.

The Massachusetts Highway Department fired employee John Arsenault after police found a loaded handgun in his work toolbox. This was a violation of Massachusetts law.<sup>1</sup> This offense was compounded by the fact that the serial numbers on the handgun had been removed, which is also a violation of Massachusetts law.<sup>2</sup> Arsenault claimed that he had found the gun and was waiting for a police friend's advice on what to do with it.

The Highway Department had a written policy against having weapons on the work premises. This policy stated that violation could result in "disciplinary action up to and including termination."<sup>3</sup> The Highway Department did not fire Arsenault immediately, but did so a year later after he was alleged to be in possession of marijuana. The charge of marijuana possession, however, would later not be an issue because the arbitrator dismissed the charge and the court did not further consider the issue.<sup>4</sup>

After the Highway Department fired Arsenault, he filed a grievance with his union. In accordance with the union's collective bargaining agreement, Arsenault's grievance was brought to arbitration. Stating that just cause did not exist for Arsenault's termination, the arbitrator ordered the Highway Department to reinstate him. Arsenault was reinstated from his seven-month suspension without back pay.

The Highway Department brought the arbitrator's decision to the Massachusetts Superior Court and asked to have the arbitrator's award vacated because the decision was contrary to public policy. The Highway Department argued that the award "violates the Commonwealth's explicit, well-defined and dominant public policy against the unauthorized possession

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\* 648 N.E.2d 430 (Mass. 1995).

<sup>1</sup> See MASS. GEN. LAWS. Ch. 269, §10 (1990).

<sup>2</sup> See MASS. GEN. LAWS. Ch. 269, §11C (1990).

<sup>3</sup> See *Mass. Highway*, 648 N.E.2d at 431.

<sup>4</sup> See *id.* at 431 n.2.

of handguns."<sup>5</sup> The Massachusetts Superior Court affirmed the arbitrator's decision. From this decision, the Massachusetts Highway Department appealed.

The Supreme Judicial Court of Massachusetts noted at the outset that Massachusetts courts have the power to overturn an arbitrator's decision if "the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law."<sup>6</sup> As a result, the court stated that "[a]rbitration, it is clear, may not 'award relief of a nature which offends public policy or which directs or requires a result contrary to express statutory provision.'"<sup>7</sup>

However, the Supreme Judicial Court of Massachusetts noted that there were no Massachusetts cases that addressed the type of public policy issue raised in this case.<sup>8</sup> Due to the lack of Massachusetts cases on point, the court examined federal cases<sup>9</sup> which explored this issue.

The Supreme Judicial Court of Massachusetts relied primarily on two United States Supreme Court cases: *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*<sup>10</sup> and *United Paperworkers Int'l. Union v. Misco, Inc.*<sup>11</sup>

In *W.R. Grace*, the United States Supreme Court considered an arbitrator's award made in accordance with a collective bargaining agreement. The Supreme Court reinstated an arbitrator's award, holding that "[u]nder well established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one."<sup>12</sup> A court must uphold an arbitrator's award unless the

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<sup>5</sup> *Id.* at 432.

<sup>6</sup> MASS. GEN. LAWS. Ch. 150C, §11(a)(3) (1992).

<sup>7</sup> *Mass. Highway*, 648 N.E.2d at 432 (citing *Plymouth-Carver Regional Sch. Dist.*, 553 N.E.2d 1284 (Mass. 1990) (citing *Lawrence v. Falzarano*, 402 N.E.2d 1017 (Mass. 1980)).

<sup>8</sup> *See id.* at 433. The court said that its previous decisions that vacated an arbitrator's award concerned "awards which directly conflicted with a statutory limit on, or delegation of, power." *Id.* (citing *Watertown Firefighters, Local 1347 v. Watertown*, 383 N.E.2d 494 (Mass. 1978); *School Comm. of Hanover v. Curry*, 343 N.E.2d 144 (Mass. 1976); *Boston v. Boston Police Patrolmen's Ass'n*, 392 N.E.2d 1202 (Mass. Ct. App. 1979)).

<sup>9</sup> Normally, federal courts have jurisdiction for the review of an arbitrator's ruling made under a collective bargaining agreement. However, state courts have jurisdiction for a review of an arbitrator's ruling made under a state employment collective bargaining agreement. Due to the lack of Massachusetts cases on point, the Supreme Judicial Court of Massachusetts looked mostly to federal decisions where more precedent exists on the public policy issue.

<sup>10</sup> 461 U.S. 757 (1983).

<sup>11</sup> 484 U.S. 29 (1987).

<sup>12</sup> *W.R. Grace*, 461 U.S. at 764.

award does not "draw[] its essence from the collective bargaining agreement."<sup>13</sup>

The Supreme Court further held in *W.R. Grace* that for a court to vacate an arbitration award on the grounds of public policy, the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"<sup>14</sup>

In the United States Supreme Court case *United Paperworker's International Union v. Misco, Inc.*,<sup>15</sup> the Court considered a Fifth Circuit Court of Appeals case that vacated an arbitrator's ruling that reinstated a suspended employee. The employer had fired an employee after police found the employee on the employer's lot in a car containing marijuana smoke with a lit marijuana cigarette in the car's ashtray. Later, police found gleanings of marijuana in the employee's own car. The employee filed a grievance and the issue went to an arbitrator pursuant to a collective bargaining agreement. The arbitrator ordered the employer to reinstate the employee. The Fifth Circuit vacated the decision upon the public policy that guards "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."<sup>16</sup>

The Supreme Court in *Misco* reiterated its holding from *W.R. Grace* that "a formulation of public policy based only on 'general supposed interests' is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective bargaining agreement."<sup>17</sup> However, the Court held that not enough evidence existed to show that the employee had been or would be under the influence of the drug when he performed his job. Even if the public policy stated by the Fifth Circuit was acceptable, the link between the evidence of the employee's conduct and the use of drugs in the workplace was "tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals."<sup>18</sup>

After examining these United States Supreme Court cases, the Supreme Judicial Court of Massachusetts concluded that two situations exist in which public policy requires that a court vacate an arbitration award that reinstates a discharged employee. First, the exception applies when the employee's conduct was "disfavored conduct which is integral to the performance of

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 766 (citing *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

<sup>15</sup> 484 U.S. 29 (1987).

<sup>16</sup> *Id.* at 44.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

employment duties.”<sup>19</sup> Second, the exception applies to an award that “violates public policy which relates to the employee’s job and which exists because the job itself makes the employee’s conduct an immediate threat to the general public.”<sup>20</sup>

Limitations exist, however, on the extent of the public policy exception to arbitration awards. The court stated that “arbitration awards reinstating employees are upheld if the employees’ conduct, even though harmful, was not related to their job activities and did not pose a special risk to the public due to their job.”<sup>21</sup> Furthermore, “[i]f an award is permissible, even if not optimal for the furtherance of public policy goals, it must be upheld. Arbitration awards reinstating employees are therefore upheld if the public policy, which disfavoring the employee’s conduct, does not require dismissal.”<sup>22</sup>

For a source of public policy, the court first considered the Massachusetts criminal law. In the Commonwealth of Massachusetts, it is a criminal offense for a firearm owner to have a concealed firearm in a place other than the firearm owner’s house or the place of business that the firearm holder owns. Because the law does not require the dismissal of an employee, the court held that the violation of this law was not sufficient to vacate the arbitrator’s reinstatement of Arsenault. The court held that “[t]he criminal laws do not dictate that an employee who is found to possess an illegal firearm must be terminated.”<sup>23</sup> Additionally, the court found that Arsenault’s “possession of the gun at work did not go to the heart of his employment duties.”<sup>24</sup>

The court next briefly considered the common law policy of an employer’s duty to provide a safe workplace for its employees. On this issue, the court concluded that the department’s workplace safety must have not been “sufficiently threatened” by Arsenault’s reinstatement because Arsenault continued to work for the department for nearly a year after his handgun offense.<sup>25</sup> The court also concluded that Arsenault’s seven-month suspension of employment without pay and a record of wrongful conduct provided sufficient disciplinary action.<sup>26</sup>

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<sup>19</sup> *Mass. Highway*, 648 N.E.2d at 433 (citing *Delta Air Lines v. Air Line Pilots Ass’n*, Int’l, 861 F.2d 665, 671 (11th Cir. 1988) (pilot flew an airliner while intoxicated)).

<sup>20</sup> *Id.* at 433 (citing *Exxon Shipping Co. v. Exxon Seamen’s Union*, 993 F.2d 357, 367 (3d Cir. 1993) (captain of oil tanker tested positive for drugs)).

<sup>21</sup> *Id.* at 434.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 435.

<sup>24</sup> *Id.*

<sup>25</sup> *See id.* at 435 n.8.

<sup>26</sup> *See id.* at 435.

Without a dominant public policy requiring the arbitrator's award to be vacated, the court affirmed the arbitrator's decision. Citing a Minnesota state decision, the court concluded that although "Arsenault's conduct 'would have provided sufficient grounds for an arbitrator to find "just cause" for discharge, we recognize that the parties bargained for the arbitrator's interpretation of the contract and that even our strong disagreement with the result does not provide sufficient grounds for vacating the arbitrator's award.'"<sup>27</sup>

The Supreme Court noted in *Misco* that the circuit courts were divided on the issue of when a court can vacate an arbitrator's award on the basis of public policy.<sup>28</sup> Unfortunately, the *Misco* decision did not reach that issue and disagreement remains among the circuits. Some circuits have taken a broad view of the public policy exception. This view states that a court can vacate an arbitrator's award if the employee misconduct violated a well-defined public policy.<sup>29</sup> The circuit courts that appear to have taken this view are the First, Second, Third, Fifth, Eighth and Eleventh.<sup>30</sup> The narrow view of the public policy exception states that a court can only vacate an arbitrator's award if the arbitrator's award itself violates a well-defined public policy.<sup>31</sup> The circuit courts that have taken the narrow view appear to include the Fourth, Seventh, Ninth, Tenth and D.C. Circuit.<sup>32</sup>

In *Mass. Highway*, the Commonwealth of Massachusetts adopted the narrow view of the public policy exception. Arsenault's conduct at work violated well-defined public policies of the commonwealth and of his employer. A court following the narrow view could have used Arsenault's misconduct as a basis for vacating the reinstatement award. But the arbitrator's reinstatement itself did not violate any well-defined public policies. The court noted that "[t]he criminal laws do not dictate that an employee who is found to possess an illegal firearm must be terminated."<sup>33</sup> Similarly, the employer's written policy against the possession of handguns at work did not require that an employee be discharged for a violation of

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<sup>27</sup> *Id.* at 434 (citing *State Auditor v. Minnesota Ass'n of Professional Employees*, 504 N.W.2d 751, 757-758 (Minn. 1993)).

<sup>28</sup> 484 U.S. at 35.

<sup>29</sup> See Deanna J. Mouser, *Analysis of the Public Policy Exception After Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator*, 12 INDUS. REL. L.J. 89, 89 (1990).

<sup>30</sup> See Arius J. Stephens, Note, *The Sixth Circuit's Approach to the Public-Policy Exception to the Enforcement of Labor Arbitration Awards: A Tale of Two Trilogies?*, 11 OHIO ST. J. ON DISP. RESOL. 441, 450 (1996).

<sup>31</sup> See Mouser, *supra* note 30, at 89.

<sup>32</sup> See Stephens, *supra* note 31, at 450-451.

<sup>33</sup> *Mass. Highway*, 648 N.E.2d at 435.

that policy.<sup>34</sup> Because the arbitrator's reinstatement award itself did not violate any well-defined public policy, the Massachusetts Supreme Court affirmed the arbitrator's award.

The court also briefly considered the common law duty for an employer to provide a safe workplace for its employees. The court held that Arsenault did not sufficiently threaten the workplace environment, considering that he worked for nearly one year from the time of his violation to his employment termination.

The Massachusetts Supreme Judicial Court's treatment of the workplace safety issue is not unique. In the Third Circuit case *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*,<sup>35</sup> the court affirmed an arbitrator's reinstatement of a postal employee who fired gunshots at his unoccupied supervisor's car. The court held that the reinstatement would not result in workplace damage or injury considering that the reinstated employee worked for eleven days without incident between the time of his misconduct and his termination.<sup>36</sup> This employment period of eleven days without incident makes the *Mass. Highway's* employment period of nearly one year seem long.

In brief, the Massachusetts Supreme Judicial Court adopted the narrow view of the public policy exception in the *Mass. Highway* decision. This narrow view states that a court will not vacate an arbitrator's award unless the award itself violates public policy. The broad view states that a court can vacate an award if the employee's misconduct violated a well-defined public policy. Following the narrow view, the *Mass. Highway* court affirmed the arbitrator's award because the award itself did not violate any well-defined public policy.

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<sup>34</sup> See *id.* at 434-435.

<sup>35</sup> 839 F.2d 146 (3d Cir. 1988).

<sup>36</sup> See *id.* at 147.